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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

Number 341

BRIDGE AUTO RENTING CORPORATION and BRIDGE LEASING CORPORATION,
Petitioners,

against

WILLIAM J. PEDRICK, Collector of Internal Revenue,
Respondent.

METROPOLITAN DISTRIBUTORS, INC.,
Petitioner,

against

JAMES W. JOHNSON, Collector of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CARLOS L. ISRAELS,
HERMAN L. WEISMAN,
JAMES B. LIBERMAN,
Counsel for Petitioners.

September, 1949

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Bridge Auto Renting Corporation ("Bridge Auto"), Bridge Leasing Corporation ("Bridge Leasing") and Metropolitan Distributors, Inc. ("Metropolitan") respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed (Judge CHARLES

E. CLARK dissenting) the judgment of the District Court dismissing petitioners' complaint.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C. Section 1254 and Section 2101 (62 Stat. 869) and Rule 38 of the Rules of this Court.

The order of the Court of Appeals, for review of which this petition for a Writ of Certiorari is filed, was entered June 22, 1949.

Opinions Below

The majority opinion of the Court of Appeals and the dissenting opinion of Judge CLARK are reported in 174 F. (2d) 733 and are printed in the record (R. 254-267). The opinion of the District Court is not reported and is printed in the record (R. 228-244).

Questions Presented

1. Whether petitioners, who have for many years been engaged in the business of leasing trucks to mercantile establishments for use by the latter in picking up and delivering their own goods, are "persons engaged in the business of transporting property for hire", within the meaning of Section 3475 of the Internal Revenue Code, solely by reason of the fact that, with respect to less than ten percent of their business, petitioners provide, on a non-profit basis, a payroll disbursement service for drivers of such leased trucks?

2. Whether, by merely furnishing a payroll service to less than ten percent of their lessees, petitioners have converted their activity of leasing trucks into the "transportation of property", within the meaning of Section 3475, even though it is conceded by the Collector and by the

Courts below that the leasing of trucks—which comprises more than 90% of petitioners' business—in and of itself does not constitute the "transportation of property"?

3. Whether the amounts received by petitioners as truck rentals from lessees who utilize petitioners' non-profit payroll service are "amounts paid for the transportation of property" within the meaning of Section 3475?

Statute Involved

Section 3475 of the Internal Revenue Code (56 Stat. 979, 26 U. S. C. Sec. 3475) provides, in pertinent part, as follows:

> (a) "There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation * * * of property by rail, motor vehicles, water, or air * * * a tax equal to 3 per centum of the amounts so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company or similar person * * *."

Statement

The relevant findings of fact of the District Court, which petitioners did not dispute in the Court of Appeals and which were, in pertinent part, adopted by that Court, may be briefly summarized as follows:

Metropolitan and Bridge Auto, a subsidiary of Metropolitan, have for many years conducted a business consisting of the leasing of automobile trucks to mercantile concerns for use by the latter to pick up and deliver their own merchandise (R. 229). Bridge Leasing, also a subsidiary of Metropolitan, has for many years operated, on a non-profit basis, a payroll service consisting of the pay-

ment of the wages, payroll taxes and workmen's compensation insurance of the drivers or chauffeurs of such lessees of Metropolitan and Bridge Auto as desired such service (R. 230). Bridge Leasing receives from lessees using this payroll service only its direct out-of-pocket costs (R. 230). Less than ten percent of the lessees of Metropolitan and Bridge Auto use the payroll service (R. 238). This pattern of business operation by the three petitioners was well established long before the enactment in 1942 of Section 3475 (R. 229).

Petitioners do not solicit customers for the payroll service conducted by Bridge Leasing and furnish such service only at the request of a truck lessee (R. 236). In undertaking the service, the lessees' drivers are taken off the lessees' payroll and placed on Bridge Leasing's payroll (R. 236). If a driver became unsatisfactory to the lessee or left, either the lessee obtained a new driver and sent him to petitioners or petitioners were notified and requested to obtain a new driver (R. 236). If a driver became unsatisfactory to petitioners, petitioners notified the lessee and the same procedure was followed (R. 236). Petitioners could not discharge a driver without the consent of the lessee and petitioners gave no instructions to the drivers, except as to reporting accidents, breakdowns, etc. (R. 236). The drivers received from the lessees instructions as to duties—when and where to report in the morning, what and where deliveries were to be made, etc. (R. 236). Wages and working conditions were fixed by the union contract or by the lessees; if complaints were made, they were made to the lessees (R. 236). Union contracts were executed by petitioners with the union having jurisdiction, usually on behalf of a named lessee, but only after the lessee had approved the contract or authorized its execution (R. 237). Petitioners had separate union contracts covering their own employees (R. 237). The drivers on the Bridge Leasing payroll had only such privileges, seniority rights, etc., as were given by the lessees; they did not participate in any of the benefits

afforded by petitioners to their employees, except that they were eligible, like all drivers of petitioners' trucks—*i.e.*, whether the payroll service was used or not by the lessee —for "safety" awards (R. 237). The drivers turned over to the lessees all collections made, as well as all receipts for merchandise delivered, and petitioners were not held responsible for losses or misdelivered merchandise or for collections not turned in (R. 237). The drivers were not bonded by petitioners unless the lessees desired it, and in such instances the lessees paid the premiums (R. 237). The time records for each driver were turned over weekly to lessees for approval and payroll checks were issued only upon approval of such time records by the lessees (R. 237).

The tax imposed by Section 3475 is a tax of 3% upon amounts paid "for the transportation of property" within the United States to "a person engaged in the business of transporting property for hire". The taxes sought to be recovered were imposed upon (a) the amounts received by Metropolitan and Bridge Auto as truck rentals from 42 of their respective lessees during the December 1, 1942-December 31, 1946 period and (b) the amounts received during this period by Bridge Leasing from the same lessees as reimbursement for the wages, payroll taxes and compensation insurance disbursed by Bridge Leasing for the account of such lessees. No such taxes were attempted to be imposed upon what constitutes more than 90% of petitioners' income, namely, the amounts received by Metropolitan or Bridge Auto as truck rentals from their other lessees who did not use the payroll service furnished by Bridge Leasing.

Specification of Errors to Be Urged

We respectfully submit that the Court of Appeals for the Second Circuit erred in the following respects:

(1) In holding as a matter of law that petitioners transported property of another;

(2) In holding as a matter of law that the petitioners are persons engaged in the business of transporting property for hire; and

(3) In holding as a matter of law that petitioners received payments for the transportation of property.

Reasons for Granting the Writ

1. The Court below has decided important questions of federal law which have not been, but should be, settled by this Court.

As was expressly recognized by the Court below, its decision is in conflict with two other federal court decisions, namely, *Ohio River Sand Co.* v. *Commissioner*, 60 F. Supp. 563 (W. D., Ky., 1945), which the Court below characterized as "indistinguishable" from the present case, and *Lyle* v. *United States*, 76 F. Supp. 787 (N D., Ga., 1948). This Court has not passed upon Section 3475 and the existing conflict in federal decisions presents difficulties to taxpayers in determining their tax liability, if any, with respect to their day-to-day operations.

The majority in the Court below apparently recognized that the correctness of its decision was open to serious question, for it went out of its way to point out that "in doubtful • • • [cases] the final decision is the only 'right' one" (R. 267). This comment by the majority in the Court below is in sharp contrast with the dissenting opinion of Judge CLARK in the Court below who stated (R. 267):

> "Appellant seems to me so completely in the business of renting trucks, rather than 'of transporting property for hire,' that I do not believe the decision below should stand. Admittedly that is so far true of some 90 per cent of its business that as to that there is not even a claim of taxability. As to the rest, the unpaid services in looking after some details of the personnel—apparently valuable because of appellant's ability to make arrangements with the unions and to afford employers insulation from such

negotiations—do not seem to me to change the essential significance of the final control over the operations of the trucks left with appellant's customers. It is to be noted that the payments were based entirely upon the time-mileage use of the trucks, not upon carriage of specific goods. This was significant to show nontaxability as to the 90 per cent of the business; it should not be overlooked as to this small balance. Further there is surely an anomaly in saying that this small gratuitous service for this limited group of customers renders the entire service as to them, renting and all, completely taxable".

2. The decision of the Court below is in probable conflict with the decisions of this Court.

The majority in the Court below based its decision, in part, upon analogy to decisions under the Motor Carrier Act, 49 U. S. C., Sections 301-327. The leading relevant decision under that statute is the case of *Motor Haulage Co.* v. *United States,* 331 U. S. 784, 91 L. Ed. 1815, 67 S. Ct. 1205 (1947), affirming without opinion the decision of a statutory court reported in 70 F. Supp. 17 (E. D., N. Y., 1947). That the majority in the Court below misconstrued and misapplied the *Motor Haulage* case is best demonstrated by the fact that Judge CLARK was the only member of the Court below in this case who was also a member of the statutory court in the *Motor Haulage* case and, as set forth above, Judge CLARK sharply dissented in this case.

As is apparent from the findings of fact of the District Court adopted by the Court of Appeals, petitioners had no control over, or responsibility with respect to, the activities of the drivers carried on the Bridge Leasing payroll and, indeed, had little to with them other than to serve as paying agent to them. By making dispositive of the case the name appearing on the payroll check, the Court below has based its decision upon mere formalities in disregard of the decisions of this Court in *Bartels* v. *Birmingham,* 332 U. S. 126, 91 L. Ed. 1947, 67 S. Ct. 1547 (1947); *United States* v. *Silk,* 331 U. S. 704,

91 L. Ed. 1757, 67 S. Ct. 1463 (1947); *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 92 L. Ed. 1347, 68 S. Ct. 1031 (1948); and *Murphey* v. *Reed*, 335 U. S. 865, 93 L. Ed. 91, 69 S. Ct. 136 (1948). The decision of the Court below is also in conflict with decisions of this Court which have applied the "control and responsibility test" in determining, as between lessor and lessee, who renders transportation service for compensation. Decisions of this Court have established that even the supplying of personnel to operate a rented vehicle is not the controlling criterion by which to determine, as between lessor and lessee, who is engaged in the transportation of property. *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50, 86 L. Ed. 671, 62 S. Ct. 445 (1942); *Thomson* v. *United States*, 321 U. S. 19, 88 L. Ed. 513, 64 S. Ct. 392 (1944); *Harrison* v. *Greyvan Lines, Inc.*, 331 U. S. 704, 91 L. Ed. 1757, 67 S. Ct. 1463 (1947).

3. The decision of the Court below is inequitable and onerous.

The amount of taxes involved in the present case is upwards of $100,000. The decision of the Court below extends the scope of the tax to activities which, in and of themselves, are concededly non-taxable, solely by reason of the fact that the petitioners performed gratuitously, a disbursing service on behalf of the lessees. The Court of Appeals, by deciding that any payment made by the lessee of a motor vehicle to the lessor in addition to the rent is sufficient to bring the lessor within the classification of a person engaged in the business of transporting property for hire, even if such payment is only incidental to a minor part of lessor's total operation and constitutes reimbursement without profit, defeats the intent of Congress to tax only such transportation as is performed for compensation. That the petitioners had no purpose to profit, and did not in fact profit, from the optional and incidental payroll service utilized by less than 10% of its lessees is abundantly clear from the findings of the trial court as affirmed and adopted by the Court below (R. 257-263). The

Court below recognized that the result produced was anomalous, but held that the anomaly was inherent in the scheme of statutory classification. By indicating doubt as to the correctness of its own decision, and by construing the statute as requiring an anomaly, the Court below acted in contravention of familiar law that, in construing a tax statute, "if the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer." *United States* v. *Merriam*, 263 U. S. 179, 68 L. Ed. 240, 44 S. Ct. 69 (1923).

Conclusion

For the foregoing reasons the writ prayed for should be granted.

Respectfully submitted,

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Counsel for Petitioners.

September, 1949